

Citation: *R. v. J.N.N.*, 2021 YKTC 53

Date: 20211013
Docket: 20-00777
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Killeen

REGINA

v.

J.N.N.

Publication of information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Noel Sinclair
Christiana Lavidas

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] KILLEEN T.C.J. (Oral): The accused, J.N.N., is charged that on or about August 1, 2019, at the City of Whitehorse, in the Yukon Territory, did commit a sexual assault on M.N., contrary to s. 271 of the *Criminal Code*.

[2] A little over a day of evidence was heard in relation to this matter. I will say that I am going to broadly break the evidence down into two parts: the evidence of the complainant in this matter, M.N.; and the evidence that came from forensic examination in some DNA results.

[3] As will be explained as I go through the facts, this is a case where there is direct evidence on several points, but on the issue of the identity of the person who sexually assaulted M.N. the evidence is circumstantial. Crown counsel provided me earlier with *R. v. Villaroman*, 2016 SCC 33. I will say I read the *Villaroman* case as recently as in the last month or so, and I am well aware of the principles set out there.

[4] In a circumstantial case, I have to consider the evidence which may include the lack of evidence on a point and then look at reasonable inferences that arise from the evidence or the lack of evidence. I have to keep in mind that a reasonable inference or a plausible inference from the evidence or lack of evidence is not the same as speculation. The way in which I have to consider the evidence is viewed logically and, in the light of reasonable human experiences, whether it is capable of supporting inference other than the accused is guilty.

[5] On August 1, 2019, the complainant, M.N., was homeless. She indicated that for a couple of months before that time, she had been living or spending the night at different places, sometimes sleeping on a bench, sometimes sleeping under a tree, sometimes sleeping at the home of an acquaintance, and, whenever possible, staying at a local shelter. She essentially was living out of a backpack. She kept her items in her backpack. She was able to leave the items in the backpack at the shelter in a locker, locked up during the day if she chose to, and, at other times, would have the backpack with her.

[6] M.N. also described that she was able to have her laundry done when she was at the shelter. She said that the laundry could not be done by her or any of the other

people staying there but, rather, had to be done by the staff. M.N. described what would occur is you would give your laundry to the staff, they would put it in a bag — presumably to be able to launder it separately from the laundry of others — and you would later get it back. She thought that she had done the laundry or had laundry done for her about two weeks before this event occurred.

[7] M.N. also said that, at the time, she was an alcoholic. She described that she drank on a daily basis. It sounded like she would drink as frequently as she could. It was not unusual for her to drink early in the day and drink, although she did not say it, I presume when there was something available to drink.

[8] On August 1, 2019, M.N. had spent the night at the shelter. She said that she knew the accused, J.N.N., and knew him well. She had met him earlier. They had some conversation. She had learned that he was related to her on her mother's side and, accordingly, she viewed him as family. She said that she had never spent the night with him, and she had never slept in close proximity to him. She said when they would both stay at the shelter, J.N.N. would stay on the male side, and she would stay on the female side. It sounds like the staff were careful to make sure that there was no intermingling of the two groups at the shelter. She would talk to J.N.N. at the shelter sometimes in a public area, sometimes in the smoking area, which may or may not have been the same area, but, in any event, that was the extent of her interaction with him. She said she sort of viewed him as family.

[9] On August 1, 2019, there was no indication that M.N. had spent any time with J.N.N. She had, in fact, gone with a friend of hers, J.J., and the two of them had attended at a local restaurant and had something to eat.

[10] It seems that police later went to view the security video from that restaurant. I am told by the officer he could not see the complainant on the video but, on the other hand, it was a blurry image and he was not certain whether or not she was there. I did not think that this evidence was of much significance at all.

[11] M.N. indicated that she also had acquired a mickey of vodka, which she described as 341 ml. She and J.J. drank the mickey. It sounded like both had about half of that bottle of liquor. They had been at a local park for a bit and then went to the home of Mr. Regett. I did not get a lot of details about Mr. Regett, except that he lived at a location on Front St. in an apartment. Mr. Regett is now deceased and, obviously, that prevented him from providing any further evidence. I do not know what, if any, statement was taken from him. There was no application to admit into evidence anything that he might have said earlier.

[12] M.N.'s position was that she had gone there to do some cleaning, as she described him as a friend of a friend. She had cleaned there before. She described the sort of things that she was doing. She would do things such as laundry, clean up the dishes, put dishes away, and do other cleaning. She indicated that she had gone there with J.J., and also said she did not actually recall J.J. leaving. She also, at a point, was pretty sure that Mr. Regett was present but seemed to have difficulty knowing exactly where Mr. Regett was at any material time.

[13] In any event, M.N. was there for a period of time. She had another drink while she was there. She had some rum left in a bottle that was in a small plastic bag that she had with her and she drank that.

[14] There is no question that M.N. was under the influence of alcohol to some extent at that time. She described herself as being perhaps three out of ten or four out of ten after having consumed the vodka. I have to say I do not particularly find that a meaningful description because your three out of ten and my three out of ten can vary wildly. It is clear, though, that she was somewhat under the influence of liquor on that day. That became perhaps more noticeable later on as she was, for example, shaking when speaking with people. M.N. described that she was detoxing much later, which is consistent with her having been an alcoholic, had something to drink, and then the alcohol coming out of her system.

[15] In any event, she described what she was doing at Mr. Regett's apartment and said that, at one point, she had gone into the bathroom. M.N. described how when she came out of the bathroom she was in an area near a bedroom and near a living room. As M.N. came out of the bathroom, she was struck, hit over the head, and that was the end of that. She described that she must have been out cold. M.N. said that when she was coming out of the bathroom, she was carrying dirty laundry.

[16] As indicated, although M.N. had talked about J.J. and talked about it being Mr. Regett's apartment, it was not clear who was where at the time. She had not in any way included J.N.N. as being present.

[17] M.N. said that later, she regained consciousness. She thought that she had been knocked out cold. She said that when she came to, she had no idea who hit her. At that point, she was alone. The house was dark. I think she described it as getting near night. I do not know anything about this place. I do not know, for example, if the blinds were up, the blinds were down, the place faces east, the place faces north, any of that sort of information. When she awoke, her socks and her shoes and her pants and her underwear were off. Not surprisingly, she wanted to get out of the place. As she registered where she was, she said she put on her pants, her socks, and left. She left behind a jacket, her glasses, a glasses case, her shoes, and her water bottle.

[18] M.N. said that, at the time that she was getting ready to leave, she picked up her underwear which was lying beside her on the floor. She did not put the underwear on. Instead, she put it in the pocket of her pants and left.

[19] It does not seem odd that a person in those circumstances would want to put their pants on before going out, even if you had been the victim of an assault. I think that knowing that you are about to go out into a public hallway or public place might well require you to do something to cover yourself. Not putting your underwear on makes sense, in the sense that wanting to get out of there in a hurry would be consistent with having been assaulted. You do not need to put your underwear on in order to put your pants on to have your body covered as you go out into a public place.

[20] An issue arose about the underwear, in light of the fact that there was other clothing that she had apparently had with her. When coming out of the bathroom, this was the clothing that was to go out for laundry — I will talk about this more later. Her

position, though, was that the underwear that she put in her pocket was taken by her to the shelter and later to the hospital. Her clothes were turned over as part of a sexual assault protocol and the underwear was given to staff, who ultimately gave the underwear to the RCMP. I will come back to the underwear later because it features significantly in what occurred.

[21] M.N. left and went to the shelter where she had spent some time, including the previous night. It sounds like, initially, she was not going to do anything about this. She had been assaulted. When she got to the shelter, she urinated. M.N. said that she was sore. She felt like she had intercourse. There was some discharge, perhaps some blood at the time that she went to urinate. What occurred, though, was that she then spoke to a person, Clara, who was on staff at the shelter, and Clara convinced her that they should go to the hospital. They did that.

[22] Information from the hospital was filed. It appears that M.N. and Clara were at the hospital for about three hours or so before they got to see the doctor. The comments recorded in Exhibit 8, dealing with what occurred at the hospital, would tend to indicate someone under the influence of alcohol.

[23] I note when the history is described in handwriting, we have "ETOH", a common abbreviation for "ethyl-alcohol". There is something else there. I am not sure exactly what it is. But it seems pretty clear from the comments that she was upset and under the influence.

[24] In addition to the sexual assault doctor, a nurse was present and Cst. Wideman from the RCMP was at least around for part of what occurred because he, of course, took some photographs and received some exhibits.

[25] Now, when the examination took place, samples were taken — these were swabs — a blood sample was taken, and the clothing items, as described, were taken. The items that were bagged included socks, her bra, and underwear. It sounds like they were put together into a paper bag which was given to Cst. Wideman. It was taken to the RCMP and ultimately sent on to biology staff at the RCMP lab in Surrey, British Columbia.

[26] The photographs do not depict what I will describe as significant injuries or bodily harm. The photographs which are before me as Exhibit 6 show a mark on the forehead of M.N. She was not clear exactly as to how that had come about. I am just going to say that it could be a bruise. The exact origin of the mark on her forehead was not clear.

[27] A photograph of her upper thigh indicates some bruising on the left upper thigh, perhaps a little more toward the back than the midpoint on her leg. There is bruising. It was actually more obvious when it was depicted on the screen than it is in the photographs. In the photographs, I can see one area of bruising. On the screen, with better illumination, it actually appeared that there were perhaps three or four areas of bruising roughly consistent with a hand having been placed there with some pressure. So the photographs confirm that something may well have occurred to M.N. as she described.

[28] M.N.'s evidence had some difficulties with it. She was cross-examined with respect to comments made to the medical staff at the hospital. Those indicated, among other things, she said there had been four assailants. She did not recall saying that to the staff at the hospital and certainly did not recall that being the case. M.N. said that a jacket had been given to her by one of the assailants. She did not recall that and did not recall having said that to the staff. There were other things that clearly left the impression that, in terms of all the things that occurred on August 1, 2019, she simply was not certain about some of the things.

[29] With respect to the evidence that M.N. was knocked out for a period of time, there was nothing in her evidence that would indicate that that was unreliable, in the sense that it had changed, or that there was a different claim at any point in time. In terms of her position that she woke up and found that certain items of her clothing were off, nothing contradicted or was inconsistent with that, in terms of statements that she had made earlier.

[30] Some of the things that M.N. said, to a minor extent, were corroborated by the RCMP attending at Mr. Regett's apartment on a later occasion with a search warrant. For example, she described that a glasses case, described in a particular way, had been left at the apartment. The glasses case was located by the police officer. She described a particular type of water bottle that she had had with her. The water bottle was found at the apartment.

[31] M.N.'s evidence, in my view, was consistent with somebody who was, to some extent, under the influence of liquor at the time of this event on August 1, 2019. Some

of the comments she made to the police that she does not recall right now, may simply be attributable to her lack of a memory about the conversation, as opposed to what had occurred earlier. Some of the things, such as not knowing, for example, when J.J. had left, clearly could be related to that.

[32] Overall, I have to say that she struck me as somebody who was attempting to be as credible as she could be in describing this event. A credible witness, of course, may not be entirely reliable. My impression was that now, she said, more than two years sober, she has a better ability to talk about things in a reliable way. That does not mean that her memory of what occurred two years ago somehow becomes better simply because of her sobriety.

[33] With regards to the issue of the underwear, M.N. was shown the underwear. The underwear is before the Court as Exhibit 7. I would describe the underwear as being underwear that would be worn by a female. I think the predominant colour is blue or purple, but it is patterned, it has pink on it, and a different blue/grey colour. The pattern looks to me like it might be a floral pattern of some sort. I say that because when I am looking at the underwear, which she identified as being her underwear at the time, I am not simply dealing with a piece of underwear that is entirely white or entirely black or entirely some other colour where it might be easy to confuse one pair of white underwear with another pair of white underwear. She said that this underwear was her underwear.

[34] Counsel on behalf of the accused strenuously pointed out that the evidence was that there was other laundry that was about to be done at that time and that when the

complainant regained consciousness, she was not wearing her glasses. She may well have picked up something close to her on the floor and took it.

[35] The evidence that I heard yesterday when M.N. described the underwear as hers was given while she was sober. There is no question that she clearly identified the underwear as hers. It does not mean that she may not be mistaken but I have to say that it strikes me that often when we see a piece of clothing that we have not worn in a long period of time, we may instantly recognize it. An example of this is when you go to the closet in the basement and see a parka that you wore five years ago, and you have not worn it since, but you immediately remember that it is yours. It struck me that M.N.'s evidence that this was her underwear seemed to me to be reliable. It is also consistent with everything else that she had said.

[36] Now, the next part of the evidence comes from an examination conducted on the underwear. As indicated, the underwear, together with a bra and a pair of socks, were in a paper bag. Cst. Wideman had not actually opened the bag to look at those items. Instead, in some way, the bag was sent on to the national forensic laboratory in Surrey, British Columbia. Continuity of that from the time the officer had the bag until the lab had the bag, was admitted. It did not strike me as unusual that the officer would not have taken a look to see what was in the bag. Indeed, it strikes me that the safe course, in those circumstances, would simply be to take the bag and avoid completely the possibility of any contamination by not opening it to look at what was in there.

[37] When the laboratory received the exhibits, an examination was done. There were hairs that were found to be unsuitable for nuclear DNA analysis and, accordingly,

they were not analyzed. The underwear was found to have three areas where human semen was identified: an area on the lower interior front crotch; an area on the upper back on the left; and an area on the upper front crotch.

[38] The witness, Ms. Hassam, who testified about that, said that the preliminary test that you do to determine the presence of semen is a presumptive test. If the test is done and it gives a positive result, they will then continue on with an analysis. If the presumptive test does not show semen, obviously, there is not much point in continuing. The presumptive test, tests for an enzyme which is water soluble.

[39] The evidence of Ms. Hassam, whom I qualified, with the consent of counsel, as an expert able to give opinion evidence, is that because the presumptive test looks for something that is water soluble, if the item has been laundered — that is, put in water — typically, the presumptive test will not come back positive. She did indicate that there are studies that have been done that indicate that the presence of human semen can remain after laundry has been done, but pointed out that those do not deal with the issue of the presumptive test which was done, and was positive.

[40] When the analysis then was done on the three areas of the underwear, conclusions were as follows — I am summarizing.

[41] On the lower interior front crotch where the semen was found, a DNA analysis was done. The profile of the major component is that of an unknown individual. The individual was designated as Male 1. Ms. Hassam said that the substance that was present was of mixed origin consistent with having originated from two individuals and no meaningful comparison could be made to the minor component of the mixed profile

because of what she described as weakness of some components. So, two people with DNA present: Male 1, whom we later heard is J.N.N., and some other person.

[42] I am not sure that it would be speculation to say that somebody who was wearing that underwear might well have left some of their DNA on that underwear. In any event, that was found.

[43] Ms. Hassam also described that as being the interior of the underwear as opposed to potentially the exterior. She explained to me what that meant. She said that the crotch area had a second piece of cloth, a gusset there. With respect to the areas of the underwear that are a single piece of cloth, you would not necessarily know from doing the analysis whether the stain was on the interior or the exterior because of the possibility of the liquid being on both sides. She said with respect to this, the stain was clearly on the interior as opposed to the exterior or it being of uncertainty where the location was found. So, J.N.N.'s semen/DNA was found on the interior of M.N.'s underwear at the lower interior front crotch.

[44] The second sample from that underwear, what is described as the upper back on the left, was of mixed origin having originated from at least two individuals. The major component was, again, that of J.N.N. and she said no meaningful comparison could be made to the remainder of this mixed profile.

[45] The third area on the back upper left of the underwear is of mixed origin consistent with having originated from at least three individuals, including at least one male. No meaningful comparison was made with any of the samples.

[46] Not surprisingly, the vaginal swab was consistent with having come from the complainant. No male DNA typing profile was obtained. However, male DNA was detected.

[47] Ms. Hassam described that what occurred there was, because of the nature of the sample being taken from the interior of the body of the complainant, likely there were so many cells from her body that they would overwhelm any male DNA that was present.

[48] It is clear at no time did M.N. say that J.N.N. was present or had anything to do with her on that day.

[49] The issue then is: How would his semen — how would his DNA be on at least a couple of locations on her underwear, including the interior at the front lower crotch, if he had not been somehow involved in what occurred at that time?

[50] I was asked to consider the other possibilities. It could be, she described, this was not even her underwear. It was just underwear that somebody else had left at that apartment that she was about to launder, she had picked it up by mistake, and taken it. It was the case that she said that there was other clothing that she was about to launder at the time. No other details were given. I do not know anything about whether it was two items or 20. There was no suggestion in her evidence as to the nature of that, whether it was women's clothing, men's clothing, or anything else. It just was not asked.

[51] I guess the argument with respect to that could be that, number one, she is mistaken in that identification. While I certainly do have some concerns about the way in which she was acting on August 1, 2019, in her description of certain things, she did not strike me as unreliable in describing that as her underwear.

[52] Number two, the argument then that this could have been somebody else's underwear would, of course, include the fact that at Mr. Regett's home, underwear, which in my view certainly looks like underwear which would be worn by a younger female as opposed to a middle-aged or older male, was found and it had J.N.N.'s semen and DNA on it, would it be reasonably possible, based on the evidence, that that had occurred. I have to say it really struck me as speculation that that had occurred.

[53] I do not know how that set of circumstances could have existed in this context, that is, in the context of a woman who says: I was at that location; I was knocked out; when I awoke, my underwear, my pants, and my socks were off; my glasses were off; items were beside me; I picked up underwear, put it in my pocket; when I turned it over at the hospital, I did not say, "Hey, wait a second. That is a mistake. That is not my underwear."

[54] When I saw the underwear in court, she identified it as being hers, so she would have had to have been mistaken at that time.

[55] M.N.'s evidence about waking up in a condition where she must have had some type of sexual activity take place would absolutely be consistent with her underwear being beside her with the potential for DNA from an assailant on it.

[56] It strikes me to suggest that, at some other time, some other woman had taken off this underwear; somehow she had J.N.N.'s DNA on her underwear; she left it there for the purpose of laundry; she was not there in any way that is in the evidence on August 1, 2019; and the complainant mistook that underwear for hers. It seems to me to be well beyond the pale of a reasonable inference that I could draw.

[57] Defence counsel pointed out that there may be other issues with respect to the underwear. For example, both lived, at least occasionally, at the same shelter. I described the way the laundry was being done. This is not a situation where it seems to me that there could have been an easy transfer of semen from his own clothing to someone else's. The laundry was done separately. Even if the items were put into bags together – for example, mesh bags – and thrown into a washer at the same time, when the underwear was tested, the presumptive test still showed the semen. So this would have to be his underwear or his body getting semen that was fresh, not on something laundered, onto her clothing after it had been laundered. I cannot conceive of how that could have possibly occurred.

[58] There is no evidence to suggest, for example, that J.N.N. was working in the laundry at the shelter, would sometimes take items from the laundry bags of some of the women staying there, and have some sort of interaction with them. Frankly, nothing like that occurred or seems to in any way be reasonable based upon the evidence.

[59] Also, there was no clear explanation as to how J.N.N.'s DNA or his semen could have ended up on M.N.'s underwear at any other time. There is no evidence that they had close contact at any earlier point in time. There is no evidence that, for example,

they had passed out together and were laying together on the grass or on a couch or a bed together at a time when he did not have his pants on and she did not have her pants properly on. There is just no other explanation for how that might have occurred.

[60] Although we did not get into this, let me just point out that M.N. would have to consent to any sexual activity. By law, if there is no consent, it is an assault. Although it was not raised, this is not a situation where it might be said that perhaps she was sober enough to have sexual intercourse or sexual relations with J.N.N., got his DNA on her underwear by consent, and then was incapable of remembering it later. That just does not make the slightest bit of sense to me, even had she been involved in some type of activity at some occasion other than on August 1, 2019, when she was knocked to the floor. It could not have been with her consent at any other time.

[61] Accordingly, what I am left with is J.N.N.'s DNA and his semen found on two locations on M.N.'s underwear at the time when she had been knocked to the floor; had her clothing, at least below the waist removed; had something occur that seems to have left some relatively minor bruising to her; and at a time when she felt after she woke up like she had some form of vaginal penetration.

[62] Crown counsel said I should find there was penetration. I have to say that the presence of male DNA on the vaginal swab would be consistent with that. I do not know that I would be able to find that there had been, for example, a forced act of intercourse. But something clearly occurred, and there was at least some penetration of some sort of her vagina to get the male DNA there.

[63] When I put all of those things together in the context of this, I have direct evidence that I accept from M.N. that she was sexually assaulted on that occasion, although she has no idea who did it.

[64] I accept M.N.'s direct evidence that her clothing was removed as described. They were beside her. She picked up what she thought was her underwear and put it in her pocket in order to get out of there as quickly as possible.

[65] I accept her evidence that the underwear (Exhibit #7) that is before the Court has been identified as the underwear that she was wearing on that day. She is wearing different underwear in the photographs when the photographs were taken after the examination. That absolutely makes sense. She described, though, she thought her father had brought clothing there. The report seems to indicate that maybe somebody from the First Nation's Health Branch had brought clothing to her. In any event, it is immaterial. The underwear that she is wearing in the photographs was not the underwear that she was wearing at the time when she was assaulted.

[66] I am satisfied beyond a reasonable doubt that the only way in which the DNA of J.N.N. and the semen of J.N.N. could have ended up on her clothing as described is if, in fact, he had been responsible, whether alone or in conjunction with unknown others, for removing M.N.'s clothing for the purpose of some sort of sexual event, whether the event was intercourse, whether the event was digital penetration, or whether the event was something short of that. The only explanation that makes any sense in my mind for J.N.N.'s semen being found as it was, is that he was involved in a sexual event with her. That event must have occurred when she had been knocked to the floor.

[67] In the circumstances, notwithstanding the able argument of his counsel, I find beyond a reasonable doubt that on August 1, 2019, J.N.N. sexually assaulted M.N. I find him guilty of the offence of sexual assault.

KILLEEN T.C.J.